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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE,

Plaintiff and Respondent,

v.

CHARLIE STEVE HERNANDEZ,

Defendant and Appellant.

E069364

(Super.Ct.No. RIF1406285)

OPINION

APPEAL from the Superior Court of Riverside County. Thomas E. Kelly, Judge.
(Retired judge of the Santa Cruz Super. Ct. assigned by the Chief Justice pursuant to art.
VI, § 6 of the Cal. Const.) Conditionally reversed.

Valerie G. Wass, under appointment by the Court of Appeal, for Defendant and
Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney
General, Julie L. Garland, Assistant Attorney General, Arlene A. Sevidal, Collette C.
Cavalier and Randall D. Einhorn, Deputy Attorneys General, for Plaintiff and
Respondent.

Defendant and appellant Charlie Steve Hernandez stole a Jeep Cherokee and drove it around Riverside in the early morning hours of December 26, 2014, shooting at random victims. Defendant approached Jose Silva while Silva was sitting in his car and shot at him two times with a sawed-off shotgun, while standing within a few feet of him. The gun misfired both times. Defendant drove the stolen Cherokee to Alfredo Diaz's house where Diaz was about to pull out of his driveway. Defendant blocked the driveway and ran toward Diaz pointing a shotgun at Diaz. Diaz was able to drive away and no shots were fired. Defendant proceeded to drive into an alley behind a Cardenas Market where Arturo Conde was taking out the recycling. Defendant fired two shots at Conde. Conde was not hit but suffered injuries when trying to get away from defendant. None of the victims knew defendant.

Defendant was apprehended after a high-speed chase; he resisted officers both upon apprehension and at the police station. Defendant was convicted of three counts of attempted murder, assault with a firearm, possession of a sawed-off shotgun, vehicle theft, evading the police, obstructing a peace officer and numerous Penal Code section 12022.53 firearm enhancements.

On appeal, defendant claims (1) insufficient evidence was presented to support that he intended to commit the attempted murder of Diaz; (2) remand is necessary for the trial court to exercise its discretion to strike the Penal Code¹ section 12022.53 firearm enhancements after Senate Bill No. 620 (SB 620); (3) this case must be remanded to the

¹ All further statutory references are to the Penal Code unless otherwise indicated.

trial court for a mental health diversion hearing pursuant to newly enacted Penal Code section 1001.36; and (4) the abstract of judgment needs to be corrected. In supplemental briefing, defendant argues the imposition of a court operation fee (Pen. Code, § 1465.8), a court facilities fee (Govt. Code, § 70373), and a restitution fine (Pen. Code, § 1202.4, subd. (b)), without a determination of his ability to pay, violated his federal constitutional rights to due process pursuant to *People v. Dueñas* (2019) 30 Cal.App.5th 1157 (*Dueñas*).

FACTUAL AND PROCEDURAL HISTORY

A. PROCEDURAL HISTORY

Defendant was found guilty of the attempted willful, deliberate, and premeditated murder of Conde (Pen. Code, §§ 664, 187; count 1), and the jury found true the special allegation that defendant had personally used a firearm during the commission of the crimes, causing great bodily injury (Pen. Code, § 12022.53, subds. (c) & (d); the attempted willful, deliberate and premediated murders of Silva and Diaz (Pen. Code, §§ 664, 187) with the special allegations that he personally used a firearm during the commission of the crimes (Pen. Code, § 12022.53, subd. (b); counts 2 & 3) found true; assault with a firearm against Diaz (§ 245, subd. (a)(2); count 4) with the special allegation that he personally used a firearm (Pen. Code, § 12022.5, subd. (a)) found true; possession of a short-barreled shotgun (Pen. Code, § 33215; count 5); willfully evading a police officer disregarding the safety of other persons (Veh. Code, § 2800.2; count 6); unlawful driving or taking of a vehicle (Veh. Code, § 10851, subd. (a); count 7) and two misdemeanor counts of obstructing an officer (Pen. Code, § 148, subd. (a)(1); counts 8-

9). Defendant was sentenced to state prison for the indeterminate term of 46 years to life, plus the determinate term of 22 years.²

B. FACTUAL HISTORY

1. *COUNT 7: VEHICLE THEFT*

On December 11, 2014, Michael McCarty lived on Landin Lane in Riverside. He came outside of his home that morning around 5:00 a.m. and discovered that his white Jeep Cherokee with grey interior had been stolen. McCarty kept the spare keys in a small compartment inside the vehicle. On December 27, 2014, he was contacted by the Riverside Police Department and advised that his Cherokee had been found. When McCarty was given back the Cherokee, the license plates were inside and there were several items missing. He did not keep firearms or a ski mask in the Cherokee.

2. *COUNTS 1 THROUGH 6: ATTEMPTED MURDERS, ASSAULT WITH A FIREARM AND POSSESSION OF A SHORT-BARRELED SHOTGUN*

At approximately 5:30 a.m. on December 26, 2014, Jose Silva was in his truck, which was parked on the street in front of his house in Riverside; he was getting ready to drive to work. He observed headlights approaching him. The vehicle, which he described as a white or gray Jeep Cherokee, stopped near the driver's side of his vehicle. The driver of the Cherokee exited the vehicle carrying a sawed-off shotgun. He came to Silva's driver's side door. The person was wearing a dark-colored sweatshirt with a hood

² Defendant was additionally sentenced to two years in state prison on the two misdemeanor charges.

and a ski mask. The person lifted the gun and Silva heard a “click.” The shotgun was aimed at his head; it sounded like defendant had pulled the trigger. The person lowered the gun, appeared to cock the gun, and then pointed it at Silva a second time. Silva did not hear any noise and the gun did not fire. The person jumped back into the Cherokee and drove away. Silva followed the Cherokee to get a license plate number but it had no plates. Silva’s wife called the police two hours after the incident.

On December 26, Alfredo Diaz was living on Geranium Place in Riverside. He got into his truck, which was parked in his driveway facing the street, around 5:45 a.m. and intended to drive out of his driveway. He observed a white Cherokee pull up and partially block his driveway. A man exited the driver’s side of the Cherokee and ran up the driveway pointing a sawed-off, double-barrel shotgun at Diaz. The man was wearing a ski mask. He was holding the shotgun with two hands. He was rapidly approaching Diaz’s vehicle. Diaz drove over the curb and fled. After a few blocks, he remembered his family was in the house and returned. The Cherokee was gone. Diaz did not want to call the police because he did not want any problems, but his children convinced him to call the police several hours later.

Arturo Conde was working at the Cardenas Market located at Van Buren Boulevard and Arlington Avenue in Riverside on December 26. Around 6:00 a.m., he was outside the back of the store collecting plastic recyclables. He saw a white Cherokee pull up to within 38 feet of him. He went back to his work. The man in the Cherokee, who Conde identified as defendant, said something to him but Conde did not understand him. He looked up and saw that defendant had something in his hand. He then heard a

gunshot and a flash coming from defendant, who was now 20 feet from him. Defendant was pointing a gun at Conde's head.

Conde fell down thinking he may have been shot. He got back up and observed defendant "bending" the weapon. Conde got up and asked defendant why he was shooting at him. Defendant did not answer and he kept the gun pointed at Conde. Conde ran and fell down again. He heard another gunshot. He was not hit by either gunshot. He was able to get inside the store. Conde described the weapon as a shotgun.

Conde indicated that defendant was wearing a sweater or a sweatshirt. He was wearing brown or beige pants. He had jeans on under the pants. His face was not completely covered but his sweater was pulled up over his chin and he had a beanie that was pulled down over his hairline. The Cherokee had no license plates.

One of Conde's coworkers, and another person sitting in her car in the parking lot at the Cardenas Market, observed the Cherokee and a man shooting at Conde. One of them described the gun as a long gun, and the other a shotgun. The Cherokee had no license plates.

Riverside Police Officer James Payne was working patrol on December 26 and responded to the Cardenas Market. Later during his patrol, at around 11:30 p.m., he observed a white Cherokee with no license plates. Officer Payne drove behind the Cherokee, which took off at a high rate of speed. Officer Payne activated his overhead lights when the Cherokee, later determined to be driven by defendant, ran a stop sign. Defendant continued to run stop signs and drove through a park, driving on the grass and over curbs. He went the wrong way down a street then traveled over the median to the

correct lane. Defendant was driving between 70 to 80 miles per hour on surface streets. Defendant turned down a street and stopped the Cherokee. Officer Payne pulled out his gun and ordered defendant to stop. Defendant jumped over a fence and ran into a backyard.

A police dog was sent to locate defendant. The dog found defendant behind an air conditioning unit and attempted to drag defendant from his hiding place. Defendant was wearing grey sweatpants over jeans and a grey sweatshirt with a hood. Defendant yelled at the officers to “get the fuck away” from him. He told the officers that he was going to kill them if they did not get away from him. Defendant was bleeding from the police dog biting him but did not want medical attention. Defendant was transported to the hospital. He had to be restrained because of his violent behavior. Defendant was released from the hospital and taken to the police station. Once there, defendant had to be restrained by several officers.

The Cherokee was searched. The license plates were inside the vehicle. Spent shotgun shell casings were also found in the vehicle; one round of ammunition appeared to have been used but did not fire. A blue bandana was found. A .410-caliber shotgun was found under the rear passenger’s seat. A double-barrel sawed-off shotgun was found on the floorboard of the passenger’s side of the Cherokee. Live shells were in the shotgun. Marijuana was found on the floorboard of the driver’s seat. Fingerprints taken from the Cherokee matched defendant. Fingerprints on the sawed-off shotgun found in the Cherokee matched defendant. Underneath the rear passenger seat, a beanie with cut-out eyeholes was found.

Conde was taken to the location where defendant had been apprehended. Conde identified the Cherokee as the same vehicle that had been involved in his shooting. He also identified a weapon found in the Cherokee as one used to shoot at him. Conde was taken to the hospital for an in-field lineup. He was outside defendant's room and heard defendant talking. Conde got scared and said it was the same voice as the person who shot him and he did not want to go into the room to identify defendant. He was shown the clothes worn by defendant at the time of defendant's arrest; Conde identified them as the clothes worn by the shooter. In court, Conde identified defendant and stated he would never forget defendant's face. After the shooting, Conde had trouble hearing out of his left ear and his left knee was injured. He still could not walk well and used a cane.

Diaz was also taken to the area where defendant had been apprehended. Diaz told police the Cherokee was the same make and model as the vehicle that drove up to his house. He was shown a shotgun on the passenger's side floorboard of the Cherokee; it was similar to the one used against him. He also stated that defendant had the same build as the person who approached him, but since the assailant was wearing a mask, he could not identify his face.

Silva was taken to view the Cherokee and identified it as being the same as the one involved in the incident at his house. He also recognized the sawed-off shotgun that was on the floorboard of the passenger's seat. He was taken to the hospital and recognized a sweatshirt and pants shown to him as belonging to the shooter.

DISCUSSION

A. SUFFICIENT EVIDENCE OF ATTEMPTED MURDER OF DIAZ

Defendant contends his conviction of the attempted murder of Diaz must be reversed because there is an absence of substantial evidence of intent to kill.

“ ‘In reviewing a challenge to the sufficiency of the evidence . . . , we review the entire record in the light most favorable to the judgment to determine whether it discloses substantial evidence—that is, evidence that is reasonable, credible, and of solid value—from which a reasonable trier of fact could have found the defendant guilty beyond a reasonable doubt.’ [Citation.] ‘The appellate court presumes in support of the judgment the existence of every fact the trier could reasonably deduce from the evidence.’ ” (*People v. Ramirez* (2006) 39 Cal.4th 398, 464.) Reversal is not warranted “unless it appears ‘that upon no hypothesis whatever is there sufficient substantial evidence to support [the conviction].’ ” (*People v. Bolin* (1998) 18 Cal.4th 297, 331.)

“ ‘The mental state required for attempted murder has long differed from that required for murder itself. Murder does not require the intent to kill. Implied malice—a conscious disregard for life—suffices. [Citations.]’ [Citation.] In contrast, ‘[a]ttempted murder requires the specific intent to kill and the commission of a direct but ineffectual act toward accomplishing the intended killing.’ ” (*People v. Smith* (2005) 37 Cal.4th 733, 739; see also *People v. Lee* (2003) 31 Cal.4th 613, 623.) “Whenever the design of a person to commit crime is clearly shown, *slight acts* in furtherance of the design will constitute an attempt.” (*People v. Anderson* (1934) 1 Cal.2d 687, 690, italics added.)

“For an attempt, the overt act must go beyond mere preparation and show that the killer is putting his or her plan into action; it need not be the last proximate or ultimate step toward commission of the crime or crimes . . . ‘[b]etween preparation for the attempt and the attempt itself, there is a wide difference. The preparation consists in devising or arranging the means or measures necessary for the commission of the offense; the attempt is the direct movement toward the commission after the preparations are made.’ ” (*People v. Superior Court (Decker)* (2007) 41 Cal.4th 1, 8.) “Whether acts done in contemplation of the commission of a crime are merely preparatory or whether they are instead sufficiently close to the consummation of the crime is a question of degree and depends upon the facts and circumstances of a particular case.” (*Id.* at p. 14.)

“One who intentionally attempts to kill another does not often declare his state of mind either before, at, or after the moment he shoots. Absent such direct evidence, the intent obviously must be derived from all the circumstances of the attempt, including the putative killer’s actions and words. Whether a defendant possessed the requisite intent to kill is, of course, a question for the trier of fact.” (*People v. Lashley* (1991) 1 Cal.App.4th 938, 946.)

Here, the evidence was undisputed that defendant blocked Diaz’s driveway, jumped out of the Cherokee and ran toward Diaz, who was sitting in his vehicle. Defendant ran with the shotgun pointed at Diaz. Diaz immediately saw the gun and drove off. Defendant was wearing a ski mask that obscured his identity. The evidence establishes defendant took a direct act toward committing the attempted murder of Diaz.

Defendant took the time to hide his identity and ran quickly toward Diaz while pointing the shotgun at him.

Moreover, defendant's intent to kill Diaz is evident based on the totality of the circumstances from that day. Defendant first approached Silva in his driveway and shot within close range at Silva's head. The gun misfired. Defendant cocked the gun and tried to fire at Silva again. The gun misfired a second time, and defendant fled. After leaving Diaz's driveway, defendant drove to the Cardenas Market and shot at Conde twice while Conde was taking out the recycling. He had no connection with any of the victims and appeared to simply want to kill anyone who he could find outside on that fateful morning. The jury could reasonably conclude that defendant intended to kill the three random victims he encountered that morning. Substantial evidence supports that defendant intended to kill Diaz.

B. SENATE BILL 620

Defendant contends remand is required for the trial court to exercise its discretion to dismiss the gun enhancements imposed pursuant to section 12022.53 after the passage of SB 620 (eff. Jan. 1, 2018), which amended that section. The People concede the amendment is retroactive but contend that remand is unnecessary because the trial court would not have exercised its discretion to strike the firearm enhancements even if it was aware it had the discretion to do so, based on its comments and the sentence imposed.

1. *ADDITIONAL RELEVANT FACTS*

Defendant's counsel submitted a sentencing memorandum on October 4, 2017, and a motion for continuance of sentencing. Counsel asked for a continuance until

January 1, 2018, based on the possible passage of SB 620. The People opposed the continuance. At the time of sentencing, defendant's counsel asked the trial court to grant the continuance based on SB 620, which, if passed, would grant the trial court discretion on sentencing on the firearm enhancements. The People opposed the continuance based on the case having been continued for sentencing for over one year. The trial court denied the continuance.

During sentencing, defendant's counsel requested probation based on defendant's young age and minimal criminal record. The trial court denied the request stating, "If there was ever a case that called for a prison commitment, this is the one. This is one of the most chilling cases I've heard in recent years where three random attempts to kill innocent citizens. It's just absolutely terrifying, and your client needs to go to prison." The trial court imposed the upper term on the principal count, and imposed consecutive sentences, even on the misdemeanor charges.

2. SB 620

Former section 12022.53, subdivision (h) required that a true finding under section 12022.53, subdivision (d) mandated a 25-years-to-life sentence. (*People v. Woods* (2018) 19 Cal.App.5th 1080, 1082.) SB 620 modified this section and authorized trial courts to strike section 12022.53 enhancements for purposes of sentencing. The modification took effect on January 1, 2018, several months after defendant was sentenced. (Stats. 2017, ch. 682, § 2.) Section 12022.53, subdivision (h) now states, "[t]he court may, in the interest of justice pursuant to Section 1385 and at the time of sentencing, strike or dismiss an enhancement otherwise required to be imposed by this section."

As conceded by the People, the amendment is retroactive. (See *People v. Robbins* (2018) 19 Cal.App.5th 660, 678-679; *People v. Woods, supra*, 19 Cal.App.5th at pp. 1090-1091.) However, the People argue that remand would be futile because the record shows that the trial court clearly indicated at sentencing that it would not have stricken the firearm enhancements.

In *People v. McDaniels* (2018) 22 Cal.App.5th 420, 424 through 425, the court discussed remand for resentencing after the enactment of SB 620. It concluded that remand was proper because “the record contains no clear indication of an intent by the trial court not to strike one or more of the firearm enhancements. Although the court imposed a substantial sentence on McDaniels, it expressed no intent to impose the maximum sentence. To the contrary, it imposed the midterm for being a felon in possession of a firearm, and it ran that term concurrently to the term for the murder. It also struck ‘[i]n the interest of justice’ four prior convictions it had found true. Thus, nothing in the record rules out the possibility that the court would exercise its discretion to strike the firearm enhancement under section 12022.53, subdivision (d), which doubled [the defendant]’s total sentence, and then either impose time for one of the stayed lesser firearm enhancements or strike them as well. While we express no opinion on how the court should exercise its discretion on remand, that discretion is for it to exercise in the first instance.” (*Id.* at pp. 427-428.)

In *People v. Chavez* (2018) 22 Cal.App.5th 663, the court also addressed remand for resentencing after SB 620. It concluded that remand was necessary because the record did not clearly indicate the trial court would have declined to strike the firearm

enhancement because “[a]lthough the court expressed its concern regarding [the defendant's] criminal history [and the] ‘senseless’ shooting,” the court imposed the low term on one of the counts. Remand for resentencing was ordered. (*Id.* at pp. 713-714.)

On the other hand, in *People v. Franks* (2019) 35 Cal.App.5th 883, the court addressed the possibility of remand in a case involving newly enacted Senate Bill No. 1393, giving courts discretion to strike section 667, subdivision (a) prior convictions in the furtherance of justice. (*Franks*, at p. 892.) In that case the appellate court declined to remand for resentencing, finding that the trial court clearly indicated it would not exercise its discretion based on the imposition of the upper term and findings that the crimes involved several aggravating factors, including great violence. (*Id.*, at p. 893.)

Here, the trial court denied counsel’s request to grant defendant probation stating, “If there was ever a case that called for a prison commitment, this is the one. This is one of the most chilling cases I’ve heard in recent years where three random attempts to kill innocent citizens. It’s just absolutely terrifying, and your client needs to go to prison.” Further, the trial court imposed the maximum sentence allowed, imposing the upper term on the principal term,³ and consecutive sentences. The record provides a “clear indication” that the trial court would decline to exercise its recently conferred discretion to reduce defendant’s sentence on the firearm enhancements.

³ The trial court was required to stay the sentence on count 4, the principal term, as it was the same facts for which defendant was convicted in count 3, which carried a sentence of seven years to life.

C. MENTAL HEALTH DIVERSION

Defendant insists he is entitled to remand in order for the trial court to conduct a diversion hearing pursuant to newly enacted section 1001.36. The People counter that section 1001.36 is not retroactive and is inapplicable to defendant's case. Moreover, even if it applied, defendant has not met his burden of proving he qualifies for treatment under that provision and any remand would be futile.

Effective June 17, 2018, the Legislature passed Assembly Bill No. 1810 (2018 Reg. Sess.), which added sections 1001.35 and 1001.36 to the Penal Code (Stats. 2018, ch. 34, § 24) and authorizes pretrial diversion for qualifying defendants with mental health disorders. These statutes permit discretionary diversion of persons with qualifying mental disorders that contributed to the commission of the charged offense. (See *People v. Frahs* (2018) 27 Cal.App.5th 784, 789 (*Frahs*), review granted Dec. 27, 2018, S252220.)⁴ Section 1001.36 defines “ ‘pretrial diversion’ [as] the postponement of prosecution, either temporarily or permanently, at any point in the judicial process from the point at which the accused is charged until adjudication.” (§ 1001.36, subd. (c).)

The court may grant diversion under section 1001.36 if the court finds: (1) the defendant suffers from an identified mental disorder; (2) the mental disorder played a significant role in the commission of the charged offense; (3) the defendant's symptoms

⁴ The Supreme Court granted review of *Frahs*, *supra*, 27 Cal.App.5th 784 on December 27, 2018, and denied depublication pending review, to address whether the section is retroactive. Under California Rules of Court rule 8.1115, *Frahs* “has no binding or precedential effect, and may be cited for potentially persuasive value only.” (Cal. Rules of Court, rule 8.1115(e)(1), eff. July 1, 2016.)

will respond to treatment; (4) the defendant consents to diversion and the defendant waives his or her speedy trial rights; (5) the defendant agrees to comply with treatment; and (6) the defendant will not pose an unreasonable risk of danger to public safety, as defined in section 1170.18, if the defendant is treated in the community. (§ 1001.36, subd. (b).)⁵ If diversion is granted, the court may postpone prosecution for a maximum of two years and refer the defendant to an inpatient or outpatient mental health treatment program. (§ 1001.36, subd. (c)(1)(B) & (c)(3).) Assuming the defendant performs satisfactorily during the period of diversion, the court must dismiss his or her criminal charges. (§ 1001.36, subd. (e).)

The parties dispute whether section 1001.36 applies retroactively. Defendant contends that since the statute benefits defendants who qualify for mental health diversion by granting the opportunity of diversion and possible dismissal of the criminal charges, it should be applied retroactively. The People contend, relying upon section 1001.36, subdivision (c), that this section does not apply to cases that have already been adjudicated, even if the case is still pending on appeal.

Laws generally apply prospectively rather than retrospectively. (*People v. Superior Court (Lara)* (2018) 4 Cal.5th 299, 307 (*Lara*); see also § 3 [no part of the Penal Code is retroactive “unless expressly so declared”].) “ ‘But this presumption against retroactivity is a canon of statutory interpretation rather than a constitutional mandate.

⁵ The current version of section 1001.36, effective January 1, 2019, excludes certain crimes from eligibility for diversion. (§ 1001.36, subd. (b)(2).) While it includes the crime of murder it does not appear to apply to attempted murder or assault with a firearm.

[Citation.] Therefore, the Legislature can ordinarily enact laws that apply retroactively, either explicitly or by implication. [Citation.] In order to determine if a law is meant to apply retroactively, the role of a court is to determine the intent of the Legislature.’ ”

(*Lara*, at p. 307.) Under the *In re Estrada* (1965) 63 Cal.2d 740 (*Estrada*) rule, “[w]hen the Legislature amends a statute so as to lessen the punishment it has obviously expressly determined that its former penalty was too severe and that a lighter punishment is proper as punishment for the commission of the prohibited act. It is an inevitable inference that the Legislature must have intended that the new statute imposing the new lighter penalty now deemed to be sufficient should apply to every case to which it constitutionally could apply. The amendatory act imposing the lighter punishment can be applied constitutionally to acts committed before its passage provided the judgment convicting the defendant of the act is not final.” (*Estrada*, at p. 745.)

In *Frahs*, *supra*, 27 Cal.App.5th 784, the court addressed the retroactivity of section 1001.36. A jury found the defendant guilty on two counts of robbery. (*Frahs*, at p. 788.) The defendant’s case was pending on appeal when section 1001.36 was enacted. (*Frahs*, at pp. 788-789.) The defendant argued that the mental health diversion program available under section 1001.36 should apply retroactively. (*Frahs*, at p. 788.) Relying on the rule in *Estrada*, *supra*, 63 Cal.2d 740, the court in *Frahs* agreed, finding the “Legislature ‘must have intended’ that the potential ‘ameliorating benefits’ of mental health diversion to ‘apply to every case to which it constitutionally could apply’ ” and conditionally reversed the defendant’s conviction and sentence. (*Frahs*, at pp. 787, 791-793.)

The *Frahs* court rejected the same argument made by the People in this case, that the term “adjudication” limited the retroactive application. It found, “[t]he fact that mental health diversion is available only up until the time that a defendant’s case is ‘adjudicated’ is simply how this particular diversion program is ordinarily designed to operate. Indeed, the fact that a juvenile transfer hearing under Proposition 57 ordinarily occurs prior to the attachment of jeopardy, did not prevent the Supreme Court in *Lara, supra*, 4 Cal.5th 299 . . . , from finding that such a hearing must be made available to all defendants whose convictions are not yet final on appeal.” (*Frahs, supra*, 27 Cal.App.5th at p. 791.) The court concluded that although the case had “technically been ‘adjudicated’ in the trial court, [the] case [was] not yet final on appeal.” (*Ibid.*)

The *Frahs* court adopted a conditional reversal and remand procedure that required the trial court to “conduct a mental health diversion eligibility hearing under the applicable provisions of section 1001.36.” (*Frahs, supra*, 27 Cal.App.5th at p. 792.) “When conducting the eligibility hearing, the court shall, to the extent possible, treat the matter as though [the defendant] had moved for pretrial diversion after the charges had been filed, but prior to their adjudication” and follow all of the directives in section 1001.36. (*Frahs*, at p. 792.)

Frahs has been followed by several courts. (*People v. Burns* (August 14, 2019) ___ Cal.App.5th ___ [2019 Cal.App. LEXIS 755, *17]; *People v. Weaver* (2019) 36 Cal.App.5th 1103, 1111, 1112, petition for review pending, petn. filed July 24, 2019.)

We believe the reasoning in *Frahs* is sound, and until directed otherwise by the California Supreme Court, will assume that section 1001.36 is retroactive.⁶

Assuming section 1001.36 applies, here, there was significant evidence that defendant may have been suffering from a mental illness at the time he committed the instant crimes. Prior to trial, a doubt as to defendant's competency was declared. Three mental health professionals were hired to evaluate defendant to determine whether he was competent to stand trial and they all testified at a competency hearing. One of the professionals determined that defendant was "malingering mental illness" and was competent to stand trial. A second professional determined that defendant suffered from a chronic psychiatric condition of the schizophrenic spectrum and was not competent to stand trial. A third professional advised the trial court that defendant was likely malingering but needed further observation at Patton State Hospital prior to being found competent to stand trial.

Defendant's counsel argued that defendant should be found incompetent. The trial court stated at the hearing, "It's clear to me he had a psychotic break the day he was arrested. The behavior itself was bizarre. He was put in a safety cell. He was medicated. He was agitated. He had a psychotic break." The trial court was not sure if defendant

⁶ The People ask us to take judicial notice of an Assembly Floor Analysis of the bill underlying section 1001.36 (Assem. Com. on Budget, Analysis of Bill No. 1810 (2017-2018 Reg. Sess.)), arguing it shows that the Legislature was motivated by cost savings in enacting section 1001.36. As such, section 1001.36 should not be applied retroactively. We grant judicial notice, but as in *People v. Burns*, *supra*, (2019 Cal.App. LEXIS 755, *18-19), we reject that such language of cost savings amounts to a "clear indication of legislative intent overcoming normal application of *Estrada*."

had a mental illness but was certain he had a psychotic break. However, in court during the competency hearing, defendant had shown he was aware of his surroundings and what was happening around him. The trial court stated it was unclear if defendant suffered from a mental illness, but he was competent to assist counsel.

It is unclear from the record if the trial court would have granted diversion. While it is defendant's burden to show that all of the statutory criteria of section 1001.36 are met, which he clearly has not shown here, he is entitled to a hearing in order to prove his eligibility. Remand is appropriate in this case because the record "affirmatively discloses that [defendant] appears to meet at least one of the threshold requirements, namely, he suffers from a diagnosed mental health disorder. (See § 1001.36, subd. (b)(1)(A).)" (*People v. Weaver, supra*, 36 Cal.App.5th at pp. 1121-1122; *Frahs, supra*, 27 Cal.App.5th at p. 791.) While the trial court stated that defendant needed to go to prison, such comments were made after his conviction; the determination of his competency would have been pretrial. Moreover, the finding he was competent to stand trial was not a determination that his mental illness contributed to the commission of his crimes. Remand for a section 1001.36 diversion hearing is necessary because we cannot conclude based on the record that defendant would automatically be excluded from diversion.

D. ABILITY TO PAY RESTITUTION FINE AND COURT OPERATION FEES

Defendant claims, relying on *Dueñas, supra*, 30 Cal.App.5th 1157, that the trial court violated his federal constitutional right to due process by failing to determine his ability to pay the mandatory criminal conviction assessment fee of \$270 imposed

pursuant to Government Code section 70373; the court security assessment fee in the amount of \$360 imposed pursuant to Penal Code section 1465.8; and the minimum restitution fine of \$300 imposed pursuant to Penal Code section 1202.4, subdivision (b). Defendant requests that this court vacate the two assessments and stay the restitution fine until the People can show that he has the ability to pay the two fees and the restitution fine. The People argue that defendant forfeited the challenge by failing to request an ability to pay hearing in the trial court. Moreover, since the record does not support that defendant is unable to pay the fees and fines now or in the future, he has failed to show any due process infringement.

1. *ADDITIONAL FACTUAL BACKGROUND*

On October 19, 2017, the trial court imposed the minimum \$300 restitution fine (Pen. Code, § 1202.4, subd. (b)) and a \$300 stayed parole revocation fine (Pen. Code, § 1202.45). The trial court commented that whatever money defendant had should go directly to the victims. In addition, the trial court imposed a \$360 court security assessment fee (Pen. Code, § 1465.8), and a \$270 criminal conviction assessment fee (Gov. Code, § 70373). The trial court did not determine defendant's ability to pay these fines and fees.

2. *ANALYSIS*

Government Code section 70373, subdivision (a)(1) provides "To ensure and maintain adequate funding for court facilities, an assessment shall be imposed on every conviction for a criminal offense, including a traffic offense." Penal Code section 1465.8, subd. (a)(1) provides that "[t]o assist in funding court operations, an assessment

of forty dollars (\$40) shall be imposed on every conviction for a criminal offense, including a traffic offense.” These sections do not include language regarding the defendant’s ability to pay the fees. Penal Code section 1202.4, subdivision (b) provides for a mandatory minimum restitution fine in the amount of \$300 absent “compelling and extraordinary reasons for not doing so.” If the trial court wishes to exceed \$300, it must determine if the defendant has the ability to pay the additional fine. (Pen. Code, § 1202.4, subd. (d).)

On January 8, 2019, after sentencing in this case, the Court of Appeal issued an opinion in *Dueñas, supra*, 30 Cal.App.5th 1157. In *Dueñas*, the defendant was a probationer who suffered from cerebral palsy, was indigent, homeless, and the mother of young children. She requested and received a full hearing on her ability to pay the court facilities fee, court operations fee, and the mandatory minimum restitution fine. Despite her clear inability to pay these fees and fine, the trial court mandatorily imposed them. (*Dueñas*, at pp. 1162-1163.)

The appellate court held that the trial court violated defendant’s right to due process under both the United States and California Constitutions by imposing court operations and facilities assessments pursuant to Government Code section 70373 and Penal Code section 1465.8, without making a determination as to the defendant’s ability to pay even though such determination was not required by the statute. (*Dueñas, supra*, 30 Cal.App.5th at p. 1168.) Further, the court concluded that the imposition of restitution fines pursuant to section Penal Code section 1202.4, subdivision (b), raises similar constitutional concerns, and therefore held that, while the trial court must impose the

minimum restitution fine even if the defendant demonstrates an inability to pay, “the court must stay the execution of the fine until and unless the People demonstrate that the defendant has the ability to pay the fine.” (*Dueñas*, at p. 1172.)

Initially, the People contend that defendant forfeited his claim by failing to object to the imposition of these fines and arguing an ability to pay at the time of sentencing. However, *Dueñas* had not been decided at the time of defendant’s sentencing. In *People v. Castellano* (2019) 33 Cal.App.5th 485, the court rejected this forfeiture argument and found “ ‘no California court prior to *Dueñas* had held it was unconstitutional to impose fines, fees or assessments without a determination of the defendant’s ability to pay. . . . When, as here, the defendant’s challenge on direct appeal is based on a newly announced constitutional principle that could not reasonably have been anticipated at the time of trial, reviewing courts have declined to find forfeiture.” (*Id.* at p. 489.) Other courts have found forfeiture when there was a failure to object, finding (1) this was not purely a legal challenge; and (2) that the change in the law was foreseeable. (See *People v. Frandsen* (2019) 33 Cal.App.5th 1126, 1153-1154 [defendant forfeited challenge by not objecting to fines and assessments at sentencing in a case involving a restitution fine greater than the minimum].)

We need not determine whether defendant forfeited his claim on appeal or whether *Dueñas* was properly decided. Even if *Dueñas* applies to this case, the record supports defendant has the ability to pay based on his prison wages rendering any conceivable constitutional error harmless beyond a reasonable doubt. (*Chapman v. California* (1967) 386 U.S. 18, 24.)

Prisoners earn wages while in prison and restitution fines can be deducted from these wages to pay these fines. (See Pen. Code, §§ 2700, 2085.5.) In *People v. Hennessey* (1995) 37 Cal.App.4th 1830, 1837, the court held the ability to pay includes a defendant's ability to pay in the future, such as the earning of prison wages. In *People v. Frye* (1994) 21 Cal.App.4th 1483, 1487, the appellate court found that the trial court could consider both the defendant's present ability and the ability to pay in the future through the use of prison wages. Moreover, Government Code section 70373, and Penal Code sections 1202.4, subdivision (b) and 1465.8, say nothing about the *current* ability to pay.

In *People v. Johnson* (2019) 35 Cal.App.5th 134, a case decided after *Dueñas*, the court held, relying upon *Hennessey*, “Not only does the record show [the defendant] had some past income-earning capacity, but going forward we know he will have the ability to earn prison wages over a sustained period. [Citation.] The idea that he cannot afford to pay \$370 while serving an eight-year prison sentence is unsustainable. Thus, even if we were to assume [the defendant] is correct that he suffered a due process violation when the court imposed this rather modest financial burden on him without taking his ability to pay into account, we conclude that, on this record, because he has ample time to pay it from a readily available source of income while incarcerated, the error is harmless beyond a reasonable doubt.” (*Id.* at pp. 139-140.)

Here, defendant has been sentenced to 46 years to life plus 22 years in state prison. Given the length of defendant's sentence, he will have enough money to pay the assessments and fines. As in *Johnson*, even if we were to assume defendant suffered a

due process violation when the court imposed the minimum fees and fines without taking his ability to pay into account, we conclude, because he has ample time to pay the fines and fees from a readily available source of income while incarcerated, the error is harmless beyond a reasonable doubt. (*Chapman v. California, supra*, 386 U.S. at p. 24.)

E. CORRECTION OF ABSTRACT OF JUDGMENT

Defendant contends the abstract of judgment does not appropriately reflect the sentence on count 4 was stayed by the trial court. The People concede the error.

“An abstract of judgment is not the judgment of conviction; it does not control if different from the trial court’s oral judgment and may not add to or modify the judgment it purports to digest or summarize.” (*People v. Mitchell* (2001) 26 Cal.4th 181, 185.) The trial court stayed count 4, but the abstract of judgment reflects that it was imposed. As such, we will direct that the abstract of judgment be corrected to reflect count 4 was stayed.

DISPOSITION

The judgment is conditionally reversed. The cause is remanded to the superior court to conduct a mental health hearing pursuant to the guidelines in Penal Code section 1001.36. If the trial court grants diversion, and defendant successfully completes diversion, the trial court shall dismiss the charges. If the trial court denies diversion, or defendant does not complete diversion, the court shall reinstate the convictions. If the trial court denies diversion, or reinstates the convictions, it shall correct the abstract of judgment to stay the sentence on count 4. The trial court shall forward a copy of the

amended abstract of judgment to the California Department of Corrections and Rehabilitation.

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

MILLER
J.

We concur:

RAMIREZ
P. J.

SLOUGH
J.